91-1487

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Supreme Court, U.S.
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No._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

GEORGE JONES and ROBERT YOUNG, Petitioners

v.

GARY ANDERSON, BARBARA ANDERSON, DOUGLAS STEWART, JEANNIE LARKINS, MIKE TETLEY, JIM THOMAS, PAM TETLEY, and DONNA STEWART.

ON WRIT OF CERTIORARI TO THE KANSAS SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether a state's jurisdiction over a domestic corporation is sufficient, by itself, to meet the minimum contacts test for personal jurisdiction over nonresident officers and directors of that domestic corporation for tortious acts which occur outside the state, involve nonresident victims, and do not result in injury within the state, or whether such assertion of jurisdiction is in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

PARTIES TO THE ACTION

Robert Young

George Jones

Gary Anderson

Barbara Anderson

Douglas Stewart

Jeannie Larkins

Mike Tetley

Jim Thomas

Pam Tetley

Donna Stewart

Heartland Oil and Gas, Inc.

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No._____

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GARY ANDERSON, BARBARA ANDERSON, DOUGLAS STEWART, JEANNIE LARKINS, MIKE TETLEY, JIM THOMAS, PAM TETLEY, and DONNA STEWART.

PETITION FOR A WRIT OF CERTIORARI TO THE KANSAS SUPREME COURT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

George Jones and Robert Young, the petitioners herein, respectfully pray that a writ of certiorari issue to review the judgement and opinion of the Kansas Supreme Court entered in this matter on October 25, 1991

OPINIONS BELOW

The October 25, 1991, opinion of the Kansas Supreme Court, whose judgment is herein sought to be reviewed, is reported at 249 Kan. 458, 819 P.2d 1192 (1991), and is reprinted in the Appendix to this Petition, pp. 22. The Saline County District Court's Order Denying Motion to Dismiss Defendant Jones, issued December 7, 1989, is reprinted in the Appendix to this Petition, pp. 75. This was a direct appeal to the Kansas Supreme Court; there is no intermediate appellate court opinion.

JURISDICTION

The judgment of the Kansas Supreme Court was entered October 25, 1991. Petitioners timely filed their Motion for Rehearing with the Kansas Supreme Court on November 6, 1991. The Kansas Supreme Court

denied the petitioners' Motion for Rehearing on December 17, 1991. Petitioners are timely filing their Petition with the United States Supreme Court within ninety days of the Kansas Supreme Court's order denying rehearing. The jurisdiction of this Court is invoked pursuant to 28 USC § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES

This case involves the first section of the Fourteenth Amendment to the Constitution of the United States, which provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State

> shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves the Kansas long arm statute, K.S.A. 60-308(b), which is set out in verbatim in the Appendix, pp. 79, and which states in relevant part as follows:

> "(b) *Submitting to jurisdiction--process.* Any person, whether or not a citizen or resident of this

> state, who in person or through an agent or instrumentality does any of the acts hereinafter enumerated, thereby submits the person and, if an individual, the individual's personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of these acts:
>
> "(1) Transaction of any business within this state;
>
> "(2) commission of a tortious act within this state;
>
> . . . .

"(5) entering into an express or implied contract, by mail or otherwise, with a resident of this state to be performed in whole or in part by either party in this state;

"(6) acting within this state as director, manager, trustee or other officer of any corporation organized under the laws of or having a place of business within this state or acting as executor or administrator of any estate within this state."

RESERVATION OF ISSUES

Petitioners Robert Young and George Jones challenged personal jurisdiction in their Answer filed April 21, 1989. Petitioner George Jones filed a Motion to Dismiss him as a defendant for lack of personal jurisdiction on November 13,

1989; the Saline County District Court denied petitioner Jones' motion by its order dated December 7, 1989, a verbatim copy of said order is reproduced in the Appendix, pp. 75. A jury trial was held on May 29 through June 1, 1990; the jury returned a verdict finding fraud on the petitioners' part and granted rescission. Petitioners timely filed their notice of appeal on August 17, 1990, raising, among other issues, personal jurisdiction over petitioners Robert Young and George Jones.

STATEMENT OF THE CASE

This is an oil and gas non-operator interest contract rescission case brought by respondents on November 23, 1988, in Saline County District Court, Salina, Kansas, for active fraudulent misrepresentation on the part petitioner

Robert Young and fraudulent misrepresentation by silence by petitioner George Jones.

Petitioner Robert Young was an officer of Heartland Oil and Gas, Inc., a Kansas corporation doing business in Colorado as a foreign corporation. Robert Young was a Colorado resident during all times relevant to this action. Petitioner George Jones was both an officer and director of Heartland Oil and Gas, Inc. and was a Colorado resident during all times relevant to this action.

Respondents Gary Anderson, Barbara Anderson, and Donna Stewart were Kansas residents during all times relevant to this action. Respondent Douglas Stewart was a Colorado resident during all times relevant to this action. Respondents Jeannie Larkins and Jim Thomas were

Colorado residents at the time this cause of action arose and when the suit was brought, however, they moved to Hawaii prior to trial. Respondents Mike Tetley and Pam Tetley were New Jersey residents at the time this cause of action arose and when the suit was brought, however, they moved to Colorado prior to trial.

In August, 1988, respondent Gary Anderson placed telephone calls from Kansas to petitioner Robert Young in Colorado concerning the purchase of a nonoperating interest in the Earl Trenton #1 oil well located in Grant County, Oklahoma. During these calls, Robert Young made representations about the well's production capacity and risk to investors; these representations were found to constitute fraud. Robert Young mailed contracts to Kansas for the Andersons to

sign and the Andersons mailed the contracts and their money to Young in Colorado. The nonoperating interest Robert Young sold to the Andersons was personally owned by Robert Young. This was the extent of Robert Young's contact with the Andersons and with Kansas. The Andersons had no contact with petitioner George Jones.

In August, 1988, respondent Pam Tetley placed telephone calls from New Jersey to petitioner Robert Young in Colorado concerning the purchase of a nonoperating interest in the Earl Trenton #1 oil well located in Grant County, Oklahoma. During these calls, Robert Young made representations about the well's production capacity and risk to investors; these representations were found to constitute fraud. Robert Young mailed

contracts to New Jersey for the Tetleys to sign. The Tetleys mailed the contracts and their money to Robert Young in Colorado. The nonoperating interest Robert Young sold to the Tetleys was personally owned by Robert Young. This was the extent of Robert Young's contact with the Tetleys; there was no contact with Kansas concerning this transaction. The Tetleys had no contact with petitioner George Jones.

In August, 1988, respondent Douglas Stewart contacted petitioner Robert Young in Colorado and arranged for a meeting between Young, Stewart, and respondents Jim Thomas and Jeannie Larkins in Denver, Colorado for the purpose of getting information on the Earl Trenton #1 well. At Robert Young's request, petitioner George Jones drove from Colorado Springs,

Colorado to attend the Denver meeting which occurred on August 9, 1988; petitioner Jones' part in the meeting was to deliver oil well logs on the Earl Trenton #1 which he held as a director of Heartland Oil and Gas, Inc. Robert Young made representations to respondents at the Denver meeting concerning the well's production capacity and investor risks; these representations were found to constitute fraud, and George Jones' silence at the meeting was found to be fraud by silence. The only contact with Kansas resulting from this meeting is that respondent Douglas Stewart conveyed Robert Young's statements to his, Stewart's, mother, respondent Donna Stewart, who lived in Kansas. At a subsequent meeting between petitioner Robert Young and respondents Douglas Stewart, Jim Thomas

and Jeannie Larkins, Robert Young sold some of his personally owned nonoperating units to Douglas Stewart and Jeannie Larkins; petitioner George Jones did not attend this meeting. (These facts are contained in the certified record. Specific citations to pages and lines will be contained petitioners' brief).

Based upon the above facts, the Kansas Supreme Court applied the Kansas long-arm statute and found personal jurisdiction over both petitioners under K.S.A. 60-308(b)(6) dealing with nonresident officers and directors of corporations. (Appendix, pp. 44-58) The Kansas Supreme Court stated "[j]urisdiction over individual officers, directors, and employees of a domestic corporation, for claims that may result in personal liability, is predicated merely

upon jurisdiction over the corporation itself." (Appendix, pp. 58)

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because the Kansas Supreme Court's decision is in conflict with decision of the Supreme Court of the United States in *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), and its progeny.

In *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), this Court established its "minimum contacts" Due Process limitation on a state's exercise of personal jurisdiction over nonresidents. Only upon satisfying this standard may a state remain within its Due Process restrictions imposed by the Fourteenth Amendment to the Constitution of the United States. During the 1957-1958 term, this Court enumerated on the "minimum

contacts" standard in ***McGee v. International Life Ins. Co.***, 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957), and ***Hanson v. Denckla***, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958).

These three cases establish the following three-part Due Process model that must be met in each case before state jurisdiction over a nonresident can be upheld:

1). The nonresident must do some act or consummate some transaction within the state. ***Hanson v. Denckla***, 357 U.S. at 253, 78 S.Ct. at 1239.

2). The cause of action must arise out of, or result from the nonresident's act or transaction within the state. ***Hanson v. Denckla***, 357 U.S. at 251-52, 78 S.Ct. at 1238, 1239.

3). If rules one and two establish "minimum contacts" between the nonresident and the state, finding jurisdiction must comply with due process notions of "fair play" and "substantial justice". ***Hanson v. Denckla***, 357 U.S. at 251, 78 S.Ct. at 1238; ***McGee v. International Life Ins. Co.***, 355 U.S. at 223, 78 S.Ct. at 201; ***International Shoe Co. v. Washington***, 326 U.S. at 316, 66 S.Ct. at 158.

Subsequent opinions in ***Shaffer v. Heitner***, 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977); ***Kulko v. Superior Court***, 436 U.S. 84, 98 S.Ct. 1690, 56 L.Ed.2d 132 (1978); and, ***World-Wide Volkswagen Corp. v. Woodson***, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980),

have not modified the basic three-part due process model. Application of that model to the facts in this case deny the State of Kansas jurisdiction over petitioners George Jones and Robert Young for any claim made by any respondent in this case.

George Jones' only contact with Kansas was his position of officer and director of Heartland Oil and Gas, Inc., a Kansas corporation. His only involvement in this case was sitting silently during a one-time meeting in Denver with Colorado residents discussing an Oklahoma oil well. Therefore the only act or transaction within Kansas would have been becoming an officer or director of a domestic corporation. That is not sufficient to meet the first prong of the minimum contacts test. Further, the cause of action arose not from George Jones' being

an officer or director of a domestic corporation, but from his silence at the Denver meeting. This is not sufficient to fulfill the second due process prong. Finally, the concept of "fair play" and "substantial justice" do not come into play unless the first two prongs are met. Even if the first two prongs were met, it is fundamentally unfair to require a Colorado resident to personally defend an action in Kansas for an act of silence in Colorado involving all nonresidents.

As to petitioner Robert Young, his only contact with Kansas was with Gary Anderson which was unilateral contact initiated by Gary Anderson. Robert Young did, however, mail contracts to Robert Young in Kansas but only at Robert Young's request. Robert Young never had any contact with Kansas residents Barbara

Anderson or Donna Stewart. Robert Young's contact with Pam Tetley was unilateral telephone contact instituted by Pam Tetley from New Jersey. Robert Young never had contact with Mike Tetley. Robert Young's only contact with Kansas in this case was his position of officer with Heartland Oil and Gas, Inc., unilateral acts of Gary Anderson and one mailing to the Andersons. The nature and quality of these acts are insufficient to meet the first test. Further, the causes of action against Robert Young were his misrepresentations. As to the Tetleys in New Jersey, these acts were not in Kansas nor did the Tetley's suffer any injury in Kansas. As to Douglas Stewart, Jim Thomas, and Jeannie Larkins in Colorado, these acts were not in Kansas nor did these respondents suffer any injury in Kansas.

As to Donna Stewart, Robert Young never had any contact with her. The second prong is not met. Additionally, it is fundamentally unfair to require a Colorado resident to defend in Kansas causes of action arising in Colorado affecting parties in Colorado and New Jersey.

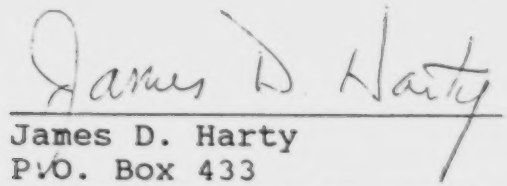
The Kansas Supreme Court found that merely serving as an officer or director of a domestic corporation establishes minimum contacts sufficient to meet due process requirements for excercising personal jurisdiction over nonresidents. The Kansas Supreme Court fails to apply any recognized analytical due process model to the facts of this case to reach the court's holding. The Kansas Supreme Court's decision is in direct conflict with this Court's application of due process limitations on state power over

nonresidents.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Kansas Supreme Court.

Respectfully submitted,



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APPENDIX A

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 65,605

GARY ANDERSON, BARBARA ANDERSON,

DOUGLAS STEWART, JEANNIE LARKINS,

MIKE TETLEY, JIM THOMAS,

PAM TETLEY, and Donna Stewart,

Appellees,

v.

HEARTLAND OIL & GAS, INC., ROBERT YOUNG,

and GEORGE JONES,

Appellants.

SYLLABUS BY THE COURT

1.

K.S.A. 1990 Supp. 60-308(b) reflects a conscientious state policy to assert jurisdiction over nonresident defendants

to the extent permitted by the due process clause of the Fourteenth Amendment to the Constitution of the United States.

2.

Membership by a nonresident upon the board of directors of a corporation organized under the laws of or having a place of business within Kansas subjects such a director to in personam jurisdiction in Kansas under K.S.A. 1990 Supp. 60-308(b)(6).

3.

Jurisdiction over individual officers, directors, and employees of a domestic corporation, for claims that may result in personal liability, is predicated merely upon jurisdiction over the corporation itself.

4.

Generally, a corporation is bound by the acts of its duly authorized officers or agents acting within the scope of their authority.

5.

A trial judge is given broad discretionary power to amend the pleadings, and the exercise of such discretion will not constitute reversible error unless it affirmatively appears that the amendment allowed or denied is so material it affects the substantial rights of the adverse party.

6.

A judge may require the jury to make special written findings as to each issue

of fact. K.S.A. 60-249. The decision to submit special interrogatories to the jury rests within the sound discretion of the trial judge and will not be disturbed on appeal absent a showing of abuse of discretion.

7.

The test on appellate review of whether the trial court abused its discretion is whether no reasonable person would agree with the trial court. If any reasonable person would agree, appellate courts will not disturb the trial court's decision.

Appeal from Saline district court; DAVID S. KNUDSON, judge. Opinion filed October 25, 1991. Affirmed.

James D. Harty, of McPherson, argued the cause, and *Dale M. Sprague*, of the same firm, was with him on the briefs for appellants.

Michael A. Montoya and *Patrik M. Neustrom*, of Achterberg, Neustrom & Montoya, of Salina, argued the cause and were on the brief for appellees.

The opinion of the court was delivered by

LOCKET, J.: This was an action brought by eight plaintiffs, five of whom were not residents of Kansas, to recover the purchase monies paid for units in an Oklahoma oil and gas well and to rescind certain agreements executed in Colorado. Plaintiffs claimed they were fraudulently induced to enter into the agreements by

nonresident officers of the Kansas corporation. At the conclusion of the trial, the trial court instructed the jury on an additional theory of fraud not raised in the plaintiffs' petition or at pretrial, *i.e.*, fraudulent promise of future events. The jury found that the defendants had committed fraud. The trial court rescinded the contracts, granted money judgments for the purchase money, and awarded prejudgment and postjudgment interest. Defendants appeal, claiming: (1) The trial court did not have personal jurisdiction over nonresident corporate officers of a Kansas corporation; (2) there was insufficient evidence for the corporation to be held liable for the actions of its corporate officers; (3) the trial court erred in instructing the jury on fraudulent promise of future

events; (4) the trial court erred in refusing to separate the theories of fraud in the verdict form to show which theory the jury applied to each defendant; and (5) the trial court erred in failing to grant the defendants' motions for directed verdicts after the evidence had been submitted.

Appellants' and appellees' statements of facts consist of disjointed facts rather than a concise and complete statement of facts as required by Supreme Court Rule 6.02(3) (1990 Kan. Ct. R. Annot. 25) and Rule 6.03(c) (1990 Kan. Ct. R. Annot. 26). The facts we recite are sufficient to determine the issues present in the appeal.

The action by the eight plaintiffs arose after Douglas Stewart purchased one unit of the production interest in the

Earl Trenton No. 1 oil and gas well, located in Grant County, Oklahoma for $5,700 from Heartland Oil & Gas, Inc., in June of 1988. It is necessary to set out the plaintiffs, the defendants, the relationship between the parties, and how Stewart's original purchase resulted in this action.

Plaintiffs Douglas Stewart, Gary Anderson, and Jim Thomas worked for the same company. Donna Stewart and Douglas Stewart are mother and son. Gary and Barbara Anderson are husband and wife. Barbara Anderson and Mike Tetley are brother and sister. Mike Tetley and Pam Tetley are husband and wife. Jim Thomas was Jeannie Larkins' boyfriend. Douglas Stewart, Jim Thomas, and Jeannie Larkins were residents of Colorado at the time of their purchases. Donna Stewart and the

Andersons were residents of Kansas. The Tetleys were residents of New Jersey.

Defendant Heartland Oil and Gas, Inc., is a Kansas corporation with Gypsum, Saline County, Kansas designated as the location of its principal office and registered agent. Defendant George Jones was Chairman of the Board of Directors, Chief Executive Officer, and Vice-President of Marketing for Heartland Oil and Gas, Inc. Jones owns, controls, or has an interest in 57 1/2% of the corporation's stock, is a resident of Colorado, and lists his home in Colorado as an out-of-state officer of the Kansas corporation. Defendant Robert Young is Vice-President of Marketing for Heartland Oil and Gas, Inc., and owns or controls approximately 7 1/2% of the corporate stock. Young is also a resident of

Colorado, and lists his home in Colorado as an out-of-state office of the Kansas Corporation.

After Douglas Stewart purchased his original unit from the corporation in June of 1988, he sold 1/2 of the unit to the Andersons for $2,850. The original purchase by Stewart and the sale to the Andersons started a chain of purchases of the production interest in the Earl Trenton No. 1 well when Douglas Stewart and the Andersons were informed that their original investment would reap them a fortune. By this time, because the well had been completed, was being tested, and was producing, the purchase price had risen to $7,500 per 1/2 unit. The plaintiffs were informed that in the near future production interest in the well would increase to $10,000 per 1/2 unit.

Based on information provided by Young, the Andersons purchased an additional 1/2 unit; Donna Stewart purchased 1/2 unit; Douglas Stewart purchased 1/2 unit; the Tetleys purchased 1/2 unit; and Jim Thomas and Jeannie Larkins purchased 1 1/2 units in the oil well together. Jim Thomas' name, however, did not appear on the agreements.

The trial transcript in this case is 800 pages. The appellants and appellees failed to adequately identify which statements by Young were misrepresentations and how these statements differed from the facts existing at the time of the statements. Neither the appellants' nor the appellees' brief properly identifies the testimony relating to the alleged misrepresentations made by Young to each of the various

plaintiffs. The following summarizes the testimony of the plaintiffs as to statements made by Young.

Young informed the plaintiffs the oil was there and they were buying oil that had already been "hit." Young advised the plaintiffs that the pipe was set, there was an 18-foot Misener zone, and oil was flowing and the well was producing in excess of 1,000 barrels a day. The oil well was going to produce 800-1,000 barrels of oil per day for 5-7 years and contained over a million cubic feet of natural gas. The risk for those who invested was over. Young supplied figures from initial production maps of other wells in the area which indicated that up to 1,572 barrels of oil were being produced by other wells in the area each day. Young did not inform the plaintiffs

there were limitations to production of oil from wells in Oklahoma. (In fact, there is a 250 barrel per day per well limit.) Young stated the well was worth millions of dollars. Young informed the plaintiffs there was not risk, absolutely nothing could go wrong, their initial investment would be returned within 60 days, their fortune was reconfirmed, and they could add a million dollars to their financial statements. Thomas testified Young ran the figures on his calculator at the Colorado meeting three of the plaintiffs attended. Before the well was plugged, its highest production was 42 barrels of oil per day.

Defendant Young testified he did not solicit any of the plaintiffs as investors in the well. At a meeting in Denver he told Douglas Stewart, Jim Thomas, and

Jeannie Larkins that there was less risk now than at the beginning of the well project. Young gave Douglas Stewart, Thomas, and Larkins a prospectus at the meeting in Denver, and they received the well log from Jones at the meeting on the 9th of August. Young denied telling the plaintiffs the well was an 800-1,000 barrel producer or that there was an 18-foot Misener zone. Young testified oil actually spewed over the top of the derrick during the drill stem test on August 4, 1988. Young denied making the statements the Tetleys and Thomas alleged or telling Donna Stewart the well was in production or the number of barrels of oil the well was producing. Young testified that, when he talked with each of the plaintiffs, they understood he was a salesperson who represented Heartland Oil.

Young testified the plaintiffs had contacted him about buying into the well. Young stated he did not initiate contact with any of the plaintiffs or solicit the plaintiffs to purchase units in the Earl Trenton No. 1.

The various purchases were made as follows: After a sales pitch by Young in a restaurant in Denver, Colorado, on August 9, 1988, Douglas Stewart, Larkins, and Thomas met Young and Jones and purchased interests in the well. There is conflicting testimony as to whether there were two or three meetings at the restaurant. Young attended all of the meetings. Jones, who attended only one meeting, never made a statement to the plaintiffs. Jones' purpose in being at the meeting was to bring the well logs for Douglas Stewart, Larkins, and Thomas to

review. There is conflicting testimony whether he actually brought the well logs.

Donna Stewart's 1/2 unit was purchased by her through her son, Douglas Stewart. Donna Stewart wrote a check to Heartland Oil Inc., for her 1/2 unit and mailed the check from Kansas to her son in Colorado. Douglas gave his mother's check to Young in Colorado. Donna Stewart's only contact with Young was by telephone from Kansas to Young in Colorado. Donna Stewart received all her information about the Earl Trenton No. 1 from her son, Douglas Stewart.

The Anderson, in Kansas, telephoned Young in Colorado to Inquire about the 1/2 unit they had previously purchased from Douglas Stewart. The parties discussed the advantages of purchasing additional units in the well. The Andersons mailed

check to Young to purchase a second 1/2 unit.

The Tetleys were informed of the possibility of investing in the Earl Trenton No. 1 by the Andersons. Pam Tetley telephoned from New Jersey to Young in Colorado. Pam Tetley sent a check from New Jersey to Young in Colorado. Young mailed a transfer agreement and a lease agreement to the Tetleys in New Jersey. Mike Tetley never had contact with Young. His information about the Earl Trenton No. 1 came from the Andersons and his wife.

Plaintiffs claim that, in addition to giving false information about the well, Young deceived them by failing to inform them they were purchasing the non-operator interests from him, not the corporation. Although the "Oil and Gas Non-Operator Production Interest Transfer Agreements"

and "Oil and Gas Lease Operation Agreements" signed by the individual plaintiffs were entitled "Heartland Oil & Gas", the units purchased by plaintiffs were owned by Young, not Heartland. Young signed the transfer agreements as the individual who owned the units.

After the plaintiffs executed the transfer agreements with Young, they were required to sign oil and gas lease operation agreements with the corporation. This added to the plaintiffs' confusion. The operation agreements stated in part:

"Heartland Oil & Gas Inc.

909 Maple - P.O. Box 346

Gypsum, Ks. 67448

(913) 536-4816

"OIL AND GAS

LEASE OPERATION AGREEMENT

"For consideration hereby acknowledged the parties hereto being Heartland Oil & Gas Inc., and/or its assigns, hereinafter referred to as Heartland or Operator and Gary Anderson referred to as Non-Operator, do hereby agree as follows:

"1. INTEREST SOLD: Pursuant to the terms hereof Heartland does hereby agree to sell to Non-Operator One units, subject to a 1/8 royalty interest, and a 1/8 overriding interest, subject to a fifty percent revisionary [*sic*] interest after payout, in and to oil and gas leases and leasehold estate thereby established covering the following described premises:

"EARL TRENTON #1 SW SW NE QUARTER OF SECTION 8-26N-7W GRANT COUNTY, OKLAHOMA -- 40 ACRES"

The lease operation agreement with Heartland Oil & Gas, Inc. was signed "Heartland Oil & Gas, Inc.

by Robert Young, V.P.

signature of officer/title"

Whether the individual plaintiffs knew they were purchasing units personally owned by Young rather than by Heartland Oil was a disputed fact. Although the language of the transfer agreements indicated a sale of units by Young rather than Heartland Oil and Gas, Inc., the jury determined Young's deception caused the plaintiffs to believe they were purchasing their non-operator interests from Heartland.

Near the end of the trial, defendants moved for directed verdicts against all plaintiffs. Their motion for directed verdict against plaintiff Thomas was granted because he had not signed the agreements.

After the jury found each of the defendants had committed fraud, the trial judge determined that the Andersons, the Tetleys, and Donna Stewart had not been fraudulently induced to enter into the agreements by Jones' silence at the Denver meetings and granted Jones' motion for directed verdict as to those plaintiffs. Based on the finding by the jury, the trial court rescinded both the transfer and operation agreements and granted money judgments equal to the purchase price of each 1/2 unit purchased, plus prejudgment and postjudgment interest. All three

defendants were held jointly and severally liable for the money judgments of Douglas Stewart and Larkins. Young and Heartland Oil and Gas, Inc., were held jointly and severally liable for the remaining money judgments. The defendants appealed.

PERSONAL JURISDICTION OVER THE DEFENDANTS JONES AND YOUNG

Defendants Jones and Young contend, except for the claims of the plaintiffs who were residents of Kansas, the trial court could not acquire personal jurisdiction over them under K.S.A. 1990 Supp. 60-308, the Kansas long arm statute. At the time the fraudulent acts occurred three of the plaintiffs were Kansas residents, two plaintiffs were New Jersey residents, and three plaintiffs were Colorado residents. Defendants Young and

Jones were Colorado residents, and defendant Heartland Oil and Gas, Inc., was a Kansas corporation.

Prior to trial, jones moved to dismiss the action against him, claiming the trial court lacked in personam jurisdiction over him under 60-308(b). The trial court found there was personal jurisdiction of Jones under 60-308(b)(6), stating:

> "Certainly 'acting within this state' taken in context does not mean the tortious act or specific business transaction must take place in Kansas. It means while an individual is serving in the capacity of an officer, manager, etc. of a Kansas corporation there is a sufficient nexus to warrant an assertion of jurisdiction over that individual as

well as the corporation so long as jurisdiction is grounded upon the individual acting as a representative of the corporation."

Additionally, without explanation, the trial court found that basic notions of due process were not offended by its assertion of in personam jurisdiction over Jones. The trial court's reference to "tortious act or specific business transaction" appears to be referencing sections (b)(1) and (b)(2) of the long arm statute.

On appeal, both defendants contend the trial court erred in holding it had personal jurisdiction over nonresident corporate officers under 60-308(b)(6). Defendants rely on *Schlatter v. Mo-Comm Futures, Ltd.*, 233 Kan. 324, 662 P.2d 553 (1983), where we determined two of the

nonresident directors of a Missouri corporation were not subject to in personam jurisdiction under 60-308(b)(6). In *Schlatter* all of the Missouri corporate directors were nonresidents of Kansas. Two of the defendants were nominal directors of the Missouri corporation, who were not involved in directing the Missouri corporation's business or did not participate in the fraudulent sale of limited partnership shares in Kansas. We held that the phrase "acting within this state," (60-308[b][6]) requires something more than a failure to act on the part of a nonresident director of a Missouri corporation. We noted if the legislature had intended that mere membership on the board of directors (of an out of state corporation) was sufficient to subject a corporate director to Kansas jurisdiction

for tortious acts of the corporation, it could easily have said so.

K.S.A. 1990 Supp. 60-308(b) states, in part:

> "(b) *Submitting to jurisdiction--process.* Any person, whether or not a citizen or resident of this state, who in person or through an agent or instrumentality does any of the acts hereinafter enumerated, thereby submits the person and, if an individual, the individual's personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of these acts:
>
> "(1) Transaction of any business within this state;
>
> "(2) commission of a tortious act within this state;

. . . .

"(5) entering into an express or implied contract, by mail or otherwise, with a resident of this state to be performed in whole or in part by either party in this state;

"(6) acting within this state as director, manager, trustee or other officer of any corporation organized under the laws of or having a place of business within this state or acting as executor or administrator of any estate within this state."

The Kansas long arm statute, K.S.A. 1990 Supp. 60-308, is liberally construed to assert personal jurisdiction over nonresident defendants to the full extent permitted by the due process clause of the Fourteenth Amendment to the United States

Constitution. *Ling v. Jan's Liquors*, 237 Kan. 629, 633, 703 P.2d 731 (1985). When the existence of personal jurisdiction is controverted, plaintiff has the minimal burden of establishing a prima facie threshold showing that constitutional and statutory requirements for the assumption of personal jurisdiction are met. *Ammon v. Kaplow*, 468 F. Supp. 1304, 1309 (D. Kan. 1979).

> "The Due Process Clause of the Fourteenth Amendment limits the power of a state court to render a valid personal judgment against a nonresident defendant. [Citation omitted.] . . . Due process requires that the defendant be given adequate notice of the suit, [citation omitted.], and be subject to the personal jurisdiction of the court

[citation omitted]. . . .

". . . [A] state court may exercise personal jurisdiction over a nonresident defendant only so long as there exist 'minimum contact' between the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.

. . . .

"Thus, the Due Process Clause 'does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or

relations.' [Citation omitted.] Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation . . . . . .

". . . '[F]oreseeability' alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause.

"This is not to say, of course, that foreseeability is wholly irrelevant. But the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into

the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there. [Citations omitted.] The Due Process Clause, by ensuring the 'orderly administration of the laws,' [citation omitted], gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291-97, 62 L. Ed. 2d 490, 100 S. Ct. 559 (1980).

The rights and obligations attached to membership in a foreign corporation, as

well as in any other corporation, are contractual in nature, yet the act of becoming a stockholder or member of such a corporation is regarded as something more than a contract, involving the relationship between the stockholder or member and the corporation, which must be governed by the law of the state granting the incorporation. Therefore, residents of one state, by becoming stockholders of a corporation incorporated under the laws of another state, submit themselves to that extent to the jurisdiction and laws of the latter state. See 36 Am. Jur. 2d, Foreign Corporations § 431 and cases cited therein.

> "In order to subject a defendant to a judgment in *personam* if he be not present within the territory of the forum state, he must have the

minimum contacts enumerated in the statute, and whether due process is satisfied depends upon the quality and nature of the activities of the defendant, which must be determined on a case by case basis." *White v. Goldthwaite*, 204 Kan. 83, Syl. ¶ 2, 460 P.2d 578 (1969).

"Three basic factors must coincide if jurisdiction is to be entertained over a nonresident on the basis of transaction of business within the state. These are (1) the nonresident must purposefully do some act or consummate some transaction in the forum state; (2) the claim for relief must arise from, or be connected with, such act or transaction; and (3) the assumption of jurisdiction by the forum state

must not offend traditional notions of fair play and substantial justice, consideration being given to the quality, nature and extend of the activity in the forum state, the relative convenience of the parties, the benefits and protection of the laws of the forum state afforded the respective parties, and the basic equities of the situation." *White v. Goldthwaite*, 204 Kan. 83, Syl. ¶ 3.

Doing business in a state supplies the minimum contact required for a nonresident to be subject to personal jurisdiction under our long arm statute. "'Business' is transacted within the state when an individual is within or enters this state in person or by agent and, through dealing with another within the state, effectuates or attempts to

effectuate a purpose to improve his economic conditions and satisfy his desires." *Woodring v. Hall*, 200 Kan. 597, 607, 438 P.2d 135 (1968). The transaction of business exists when the nonresident purposefully does some act or consummates some transaction in the forum state. *White v. Goldthwaite*, 204 Kan. at 88.

"A private corporation is an association of persons to whom the state has offered a franchise to become an artificial, juridical person, with a name of its own, under which they can act and contract, and sue and be sued." *Mackay v. New York, H.H. & H. R. Co.*, 82 Conn. 73, 81, 72 A. 583 (1909). Every corporation created under the Kansas statutes can sue or be sued "in all courts and participate, as a party or otherwise, in any judicial,

administrative, arbitrative or other proceeding, in its corporate name." K.S.A. 17-6102(2). The business and affairs of every Kansas corporation are to be managed "by or under the direction of the board of directors." K.S.A. 17-6301(1).

K.S.A. 1990 Supp. 60-308(b) reflects a conscientious state policy to assert jurisdiction over nonresident defendants to the extent permitted by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. Membership by a nonresident upon the board of directors of a corporation organized under the laws of or having a place of business within Kansas subjects such a director to in personam jurisdiction in Kansas under 60-308)b)(6). Although the defendants Young and Jones were Colorado

residents, they were corporate directors and officers of a Kansas corporation. Jurisdiction over individual officers, directors, and employees of a domestic corporation, for claims that may result in personal liability, is predicated merely upon jurisdiction over the corporation itself.

Jones contends that, if the trial court had personal jurisdiction over him, he nevertheless is protected by the fiduciary shield doctrine. Jones quotes *Wilshire Oil Company of Texas v. Riffe*, 409 F.2d 1277, 1281 n. 8 (D. Kan. 1969):

> "it has been held that while a foreign corporation is amenable to service when it transacts business through agents operating in the forum state, unless the agents transact business on their own account and not

on behalf of the corporation, the agents are not engaged in business so as to sustain

an application of the long arm statute to them as individuals."

We disagree with Jones' analysis. The fiduciary shield doctrine is not applicable to a domestic corporation or its agents conducting corporate business in or our of the state of incorporation.

WAS THERE SUFFICIENT EVIDENCE, AS A MATTER OF LAW, TO HOLD THE CORPORATION LIABLE FOR THE ACTIONS OF ITS AGENTS?

Heartland Oil asserts for it to be responsible for the actions of Jones or Young, its responsibility must be based on a recognized theory of agency law holding the principal liable. We agree with that statement.

"Generally, a corporation is bound by the acts of its duly authorized officers or agents acting within the scope of their authority." *Executive Financial Services, Inc. v. Loyd*, 238 Kan. 663, Syl. ¶ 2, 715 P.2d 376 (1986). A corporation is also liable for the torts of its agents when committed within the scope of its agents' authority and course of employment even though it did not authorize or ratify the tortious acts. *Kline v. Multi-Media Cablevision, Inc.*, 233 Kan. 938, 666 P.2d 711 (1983).

> "When a verdict is challenged for insufficiency of evidence or as being contrary to the evidence, it is not the function of this court to weigh the evidence or pass on the credibility of the witnesses. If the

evidence, with all reasonable inferences to be drawn therefrom, when considered in the light most favorable to the prevailing party, supports the verdict, it will not be disturbed on appeal." *Wisker v. Hart*, 244 Kan. 36, 37, 766 P.2d 168 (1988).

Here, there was sufficient evidence of acts of fraud by the officers or agents of the corporation to support the verdict against Heartland.

DID THE TRIAL COURT ABUSE ITS DISCRETION BY INCLUDING A CAUSE OF ACTION FOR FRAUDULENT PROMISE OF FUTURE EVENTS?

Defendants next contend the trial court (1) abused its discretion by amending the petition to include a cause of action for fraudulent promise of future events and (2) erred by instructing the

jury on that issue. The tort of fraudulent promise of future events is defined as a promise made which the promisor had not intent of performing when made, made with the agents operating in the forum state, unless the agents transact business on their own account and not on behalf of the corporation, the agents are not engaged in business so as to sustain an application of the long arm statute to them as individuals."

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K.S.A. 60-215(b) states:

> "*Amendments to conform to the evidence.* When issues not raised by the pleadings are tried by express or implied consent of the parties, they

shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his

action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence."

The trial judge did not state he was amending the petition, but said he would instruct the jury on fraudulent promise of future events.

A trial judge is given broad discretionary power to amend the pleadings, and the exercise of such discretion will not constitute reversible error unless it affirmatively appears that the amendment allowed or denied is so material it affects the substantial rights of the adverse party. *Ballhorst v. Haner-Foreman-Cale, Inc.*, 207 Kan. 89, 92, 484 P.2d 38 (1971). In *Simonich, Executrix v. Wilt*, 197 Kan. 417, 417 p.2d 139 (1966),

the executrix of an estate brought an action claiming money in a joint tenancy bank account in the names of the decedent and defendant was an asset of the decedent's estate. During the trial, the trial judge injected equitable issues on his own motion without a request by the executrix to amend her petition pursuant to K.S.A. 60-215(b). We noted that the trial judge had abused his discretion by injecting equitable issues into the case which were completely outside of the pleadings and the evidence. 197 Kan. at 424-25.

> "It is the duty of the trial court to properly instruct the jury upon the theory of the case. Errors regarding jury instructions will not demand reversal unless they result in prejudice to the appealing party.

> Instructions in any particular action are to be considered together and read as a whole, and where they fairly instruct the jury on the law governing the case, error in an isolated instruction may be disregarded as harmless. If the instructions are substantially correct, and the jury could not reasonably be misled by them, the instructions will be approved on appeal." *Trout vs. Koss Const. Co.*, 240 Kan. 86, 88-89, 727 P.2d 450 (1986).

Defendants do not identify the prejudice to them that directly resulted from the giving of the instruction on fraudulent promise of future events. Apparently, their claim is that the case was not tried on that theory and that it was prejudicial to them to allow the jury

the opportunity to consider an additional theory of fraud even though fraud was alleged in the plaintiffs' petition and the pretrial order. We disagree.

We have read the instructions, the instructions are substantially correct, and there is evidence to support the finding the defendant made a fraudulent promise of a future event. The plaintiffs' action is based on fraud, and the additional issue of fraudulent promise of future events is so similar to the fraud claim that no surprise occurred.

DID THE TRIAL COURT ERR BY NOT ITEMIZING THE DIFFERENT THEORIES OF FRAUD ON THE VERDICT FORM TO SHOW WHICH THEORY WAS APPLICABLE TO EACH DEFENDANT?

Defendants requested the trial judge to submit special questions to the jury in its verdict form. Defendants contend the

trial court erred by denying defendants' request to amend the verdict form so that the jurors were required to make a separate finding of which theory of fraud applied to each defendant. Defendants argue that lumping the different fraud theories into one finding on the verdict form deny them and the appellate courts the ability to determine which theory of fraud was applied to a particular defendant by the jury. Defendants also argue that not itemizing the different theories of fraud on the verdict form essentially instructed the jury a defendant could be found liable on any theory.

A judge may require the jury to make special written findings as to each issue of fact. K.S.A. 60-249. "The decision to submit special interrogatories to the jury

rests within the sound discretion of the trial judge and will not be disturbed on appeal absent the showing of abuse of discretion." *Schaeffer v. Kansas Dept. of Transportation*, 227 Kan. 509, 520, 608 P.2d 1308 (1980). See *Hoffman v. Haug*, 242 Kan. 867, 873, 752 P.2d 124 (1988).

Submission of a special verdict form may often assist the trial judge in the burden of submitting the law of the case by complicated instructions. Whether to submit a special verdict form or instruct the jury on the law and how it applies to each count against each defendant is within the sound discretion of the trial judge. We have reviewed the verdict form and the instructions submitted to the jury, and we find the trial judge properly instructed the jury as to the law and to the application of each theory of fraud

against a particular defendant. The trial judge did not abuse his discretion in refusing to submit a special verdict form to the jury.

DID THE TRIAL COURT ERR BY NOT GRANTING THE DEFENDANTS' MOTION FOR A DIRECTED VERDICT AS TO EACH OF THE PLAINTIFFS' CLAIMS?

Defendants' last contention is the trial court erred by not granting their motion for directed verdict as to all of plaintiffs' claims. Defendants assert (1) the representations the plaintiffs claimed were fraudulent were not of current fact and (2) there was insufficient evidence of reliance to support a finding of fraud.

> "When ruling on a motion for directed verdict, both the trial court and the appellate court are required to resolve all facts and inferences

reasonably to be drawn from the evidence in favor of the party against whom the ruling is sought, and where reasonable minds could differ on the evidence, the motion must be denied and the case submitted to the jury." *Folks v. Kansas Power & Light Co.*, 243 Kan. 57, 60, 755 P.2d 1319 (1988). The trial judge granted the motion as to certain plaintiffs and claims, but not all of the claims.

It is not necessary that we repeat all of the facts. After considering all facts and inferences reasonably to be drawn from the evidence in favor of the plaintiffs, we find that the trial court did not err in denying the defendants' motions for directed verdict.

Affirmed.

APPENDIX B

IN THE DISTRICT COURT OF SALINE COUNTY,

KANSAS

GARY ANDERSON, BARBARA ANDERSON, DOUGLAS STEWART, JEANNIE [illegible]RKINS, JIM THOMAS, MIKE TETLEY, PAM TETLEY, and DONNA STEWART,

PLAINTIFFS,

vs.

CASE NO. 88 C317

HEARTLAND OIL & GAS, INC., ROBERT YOUNG, and GEORGE JONES,

DEFENDANTS.

ORDER DENYING MOTION TO DISMISS DEFENDANT JONES

The court after reviewing the pleadings, depositions, and arguments of counsel, concludes the defendant's motion to dismiss George Jones as a party for lack of in personam jurisdiction should be denied. In support of its decision, the court expresses the following reasoning:

1. In personam jurisdiction may only be asserted under K.S.A. 1988 Supp. 60-308.

2. George Jones is an officer, director, and chief executive officer of Heartland Oil & Gas, Inc., a Kansas corporation.

3. In his capacity as an officer and chief executive officer of Heartland he participated in the one meeting at the Peppermill Restaurant in Denver.

4. For purposes of this motion only, it is assumed by the court that the defendant Robert Young made fraudulent representations to the plaintiffs Jim Thomas, Jeannie Larkins, and Doug Stewart. Moreover, these fraudulent representations were made by Young in his capacity as a representative of Heartland.

5. The court is unable to conclude as a matter of law that the defendant George Jones, as an officer and chief executive officer of Heartland, did not have an obligation to speak upon Young's fraudulent statements.

6. The court is unable to conclude as a matter of law that any fraudulent representations made by the defendant Young or any fraud by silence of the defendant Jones were not actions arising out of their relationships with and/or in their respective capacities as representatives of Heartland.

7. Therefore, pursuant to subparagraph (b)(6) of K.S.A. 1988 Supp. 60-308, the court concludes there is a statutory basis upon which to assert in personam jurisdiction over the person of Jones. Certainly "acting within this

state" taken in context does not mean the tortious act or specific business transaction must take place in Kansas. It means while an individual is serving in the capacity of an officer, manager, etc. of a Kansas corporation there is a sufficient nexus to warrant an assertion of jurisdiction over that individual as well as the corporation so long as jurisdiction is grounded upon the individual acting as a representative of the corporation.

8. Finally, the court is not persuaded under the totality of circumstances that the assertion of personam jurisdiction offends basic notions of due process.

IT IS THEREFORE ORDERED that the defendant Jones' motion to dismiss for lack of jurisdiction should be and is

overruled by the court. Entered on the 7th day of December, 1989, with copies provided to all counsel of record.

DAVID S. KNUDSON
DISTRICT JUDGE

APPENDIX C
K.S.A. 60-308

60-308. Service outside state. (a) *Proof and effect.* (1) Service of process may be made upon any party outside the state. If upon a person domiciled in this state or upon a person who has submitted to the jurisdiction of the courts of this state, it shall have the force and effect of service of process within this state; otherwise it shall have the force and effect of service by publication.

(2) The service of process shall be made (A) in the same manner as service

within this state, by any officer authorized to make service of process in this state or in the state where the defendant is served or (B) by sending a copy of the process and of the petition or other document to the person to be served in the manner provided in subsection (e). No order of a court is required. An affidavit, or any other competent proofs, of the server shall be filed stating the time, manner and place of service. The court may consider the affidavit, or any other competent proofs, in determining whether service has been properly made.

(3) No default shall be entered until expiration of at least 30 days after service. A default judgment rendered on service outside this state may be set aside only on a showing which would be timely and sufficient to set aside a

default judgment under subsection (b) of K.S.A. 60-260, and amendments thereto.

(b) *Submitting to jurisdiction--process.* Any person, whether or not a citizen or resident of this state, who in person or through an agent or instrumentality does any of the acts hereinafter enumerated, thereby submits the person and, if an individual, the individual's personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of these acts:

(1) Transaction of any business within this state;

(2) commission of a tortious act within this state;

(3) ownership, use or possession of any real estate situated in this state;

(4) contracting to insure any person, property or risk located within this state at the time of contracting;

(5) entering into an express or implied contract, by mail or otherwise, with a resident of this state to be performed in whole or in part by either party in this state;

(6) acting within this state as director, manager, trustee or other officer of any corporation organized under the laws of or having a place of business within this state or acting as executor or administrator of any estate within this state.

(7) causing to persons or property within this state any injury arising out of an act or omission outside of this state by the defendant if, at the time of the injury either (A) the defendant was

engaged in solicitation or service activities within this state; or (B) products, materials or things processed, serviced or manufactured by the defendant anywhere were used or consumed within this state in the ordinary course of trade or use;

(8) living in the marital relationship within the state notwithstanding subsequent departure from the state, as to all obligations arising for maintenance, child support or property settlement under article 16 of this chapter, if the other party to the marital relationship continues to reside in the state;

(9) serving as the insurer of any person at the time of any act by the person which is the subject of an action

in a court of competent jurisdiction within the state of Kansas which results in judgment being taken against the person;

(10) performing an act of sexual intercourse within the state, as to an action against a person seeking to adjudge the person to be a parent of a child and as to an action to require the person to provide support for a child as provided by law, if (A) the conception of the child results from the act and (B) the other party to the act or the child continues to reside in the state; or

(11) entering into an express or implied arrangement, whether by contract, tariff or otherwise, with a corporation or partnership, either general or limited, residing or doing business in this state under which such corporation or

partnership has supplied transportation services, or communication services or equipment, including, without limitation, telephonic communication services, for a business or commercial user where the services supplied to such user are managed, operated or monitored within the state of Kansas, provided that such person is put on reasonable notice that arranging or continuing such transportation services or telecommunication services may result in the extension of jurisdiction pursuant to this section.

(c) Service of process upon any person who is subject to the jurisdiction of the courts of this state, as provided in subsection (b), may be made by serving the process upon the defendant outside this state, as provided in subsection (a)(2), with the same force and effect as

through process had been served within this state, but only causes of action arising from acts enumerated in subsection (b) may be asserted against a defendant in an action in which jurisdiction over the defendant is based upon this subsection.

(d) Nothing contained in this section limits or affects the right to serve any process in any other manner provided by law.

(3) *Service by certified mail.* Service of any out-of-state process may be by certified mail, evidence by return receipt signed by any person or by restricted delivery. The attorney for the party seeking service or the party, if the party is not represented by an attorney, shall cause a copy of the process and petition or other document to be placed in an envelope addressed to the person to be

served in accordance with K.S.A. 60-304, and amendments thereto, adequate postage to be affixed and the sealed envelope to be placed in the United States mail as certified mail return receipt requested with instructions to the delivering postal employee to show to whom delivered, date of delivery, and address where delivered. The party's attorney or the party, if the party is not represented by an attorney, shall execute a return on service stating the nature of the process, the date on which the process was mailed, and the name and address on the envelope containing the process mailed as certified mail return receipt requested. The party or the party's attorney shall file the return on service and the return receipt or return envelope in the records of the action. Service of process shall be considered

obtained under K.S.A. 60-203, and amendments thereto, upon the delivery of the certified mail envelope. If the certified mail envelope is returned with an endorsement showing refusal of delivery, the serving party or the party's attorney may send a copy of the process and petition of other document to be served to the defendant by ordinary, first-class mail. The mailing shall be evidenced by a certificate of mailing which shall be filed with the clerk. Service shall be considered obtained upon the mailing by ordinary, first-class mail. Failure to claim certified mail service is not refusal of service within the meaning of this subsection.